

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

YVONNE CARTER, LOUIS D.)
FENNELL, and HAROLD D.)
HORNSBY,)
)
Plaintiffs,)
)
v.) No. CIV-06-176-L
)
JUSTIN JONES, et al.,)
)
Defendants.)

O R D E R

This matter is before the court for review of the Report and Recommendation entered by the Honorable Doyle W. Argo on March 22, 2006, in which he recommended the claims of plaintiffs Louis D. Fennell and Harold D. Hornsby be dismissed without prejudice for failure to show exhaustion of administrative remedies. Judge Argo also recommended dismissal of plaintiff Yvonne Carter's federal retaliation claim for failure to state a claim and dismissal of her state law claims pursuant to 28 U.S.C. § 1367(c)(3). The court file reflects that Fennell and Carter did not object to the Report and Recommendation within the time limits prescribed; they have thus waived their right to review. In contrast, Hornsby filed timely objections to the Report and Recommendation. Hornsby contends *sua sponte* dismissal of his action is not appropriate as exhaustion is an affirmative defense that must be raised by defendants. He also argues his claims are not

subject to the exhaustion requirement because he alleges retaliatory actions by defendants.

Pursuant to 28 U.S.C. § 636(b), the court must “make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” In accordance with this mandate, the court has reviewed the Report and Recommendation, Hornsby’s objections thereto and the case file. Contrary to Hornsby’s arguments, full exhaustion is required regardless of the nature of the claims or the relief sought. Ross v. County of Bernalillo, 365 F.3d 1181, 1182, 1184, 1188-90 (10th Cir. 2004). Moreover, the Court of Appeals for the Tenth Circuit has held that exhaustion is a pleading requirement, not an affirmative defense. Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1210 (10th Cir. 2003), *cert. denied*, 543 U.S. 925 (2004). Although Hornsby attaches documents to his objections that reflect an attempt to exhaust some of his claims, the court cannot determine that he has exhausted all of the claims alleged in his complaint. Based on its de novo review, the court concludes the Report and Recommendation should be adopted in its entirety. Judge Argo performed a thorough and thoughtful review of plaintiffs’ claims. Nothing in Hornsby’s objections convinces the court that Judge Argo’s analysis was in error.

The Report and Recommendation (Doc. No. 19) is approved and adopted in its entirety. The Motion for Emergency Preliminary Injunction (Doc. No. 2) is DENIED. Defendants’ Motion to Stay Proceedings and Request for Order Requiring

Special Report (Doc. No. 18) is DENIED as moot. Fennell's and Hornsby's claims are dismissed without prejudice for failure to exhaust administrative remedies. Carter's federal retaliation claim is dismissed for failure to state a claim. To the extent Carter asserts any state law claims, the court declines to exercise supplemental jurisdiction over those claims and they are dismissed without prejudice. Judgment will issue accordingly.

It is so ordered this 9th day of August, 2006.

Tim Leonard
TIM LEONARD
United States District Judge